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No. 93-1709

In The

Supreme Court of the United States

October Term, 1993

NEW ORLEANS 2000 PARTNERSHIP,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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v.

BOARD OF COMMISSIONERS OF THE NEW ORLEANS HALL AUTHORITY,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

The Board of Commissioners of the New Orleans Exhibition Hall Authority ("NOEHA") hereby presents its Brief in Opposition to New Orleans 2000 Partnership ("N.O. 2000")'s Petition for a Writ of Certiorari (the "Petition") to assist this Honorable Court in the exercise of its discretionary jurisdiction in accordance with United States Supreme Court Rule 15.1.

STATEMENT OF THE CASE

In attempting to invoke the jurisdiction of this Court, petitioner, N.O. 2000, makes a contrived and disingenuous

argument. N.O. 2000 tries to transform a factual jury decision into a legal constitutional issue. In so doing, it misrepresents the facts.

The premise on which petitioner's entire position is based is the false proposition that the fair market value of the expropriated property as of the date of trial was "undisputed."[1] Despite this revisionist assertion (made several times), N.O. 2000's own Petition and the trial court record clearly show that NOEHA did indeed dispute petitioner's grossly exaggerated estimates of the fair market value of the property as of the date of the trial. More specifically, N.O. 2000 admits on page 8 of its Petition that one of NOEHA's appraisers, Mr. Jim Thorns, testified "over [N.O. 2000's] objection" regarding the fair market value of the property as of the date of trial. In its post-trial analysis, N.O. 2000, unable to sustain its objection, wishes the Court to ignore Mr. Thorns' testimony as "incompetent." Unfortunately for N.O. 2000, the jury apparently did not find the testimony to be incompetent. NOEHA respectively submits that review of the competency of evidence presented at expropriation trials conducted in state courts is not a proper exercise of this Court's jurisdiction. *See, e.g., United States v. Johnson,* 268 U.S. 220, 227 (1925).

N.O. 2000 also barely mentions in its Petition that the fair market value of the property at issue was determined by a jury on a question of fact after a tremendous amount of conflicting evidence was presented to the jury and after the jury was properly instructed pursuant to *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984). The truth is that there was conflicting, and therefore disputed, evidence presented at trial concerning the fair market value of the expropriated property. Prior to making its determination as to the property's fair market value, the jury was properly instructed pursuant to *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984). The Fourth Circuit Court of

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1. *See, e.g.,* pp. 2, 8, 10, 11, 12, and 16 of N.O. 2000's Petition.

Appeal of the State of Louisiana therefore found the jury verdict and market value to be reasonable and not manifestly erroneous.

REASONS FOR DENYING THE WRIT

A. There Is No Federal Constitutional Issue In This Case.

Petitioner, N.O. 2000, attempts an imaginative, but disingenuous, argument to transform a factual jury issue into a legal constitutional issue in an attempt to invoke the jurisdiction of this Court. Unfortunately, it misrepresents the record to do so. The premise of N.O. 2000's argument is the [false] assertion that the fair market value of the expropriated property at the time of trial was "undisputed." Like a revisionist, N.O. 2000 repeats this assertion several times. In affirming the trial court's award of $13 million, the Fourth Circuit Court of Appeal of the State of Louisiana made it abundantly clear that conflicting evidence as to the property's value was presented to the jury by both parties at trial and decided it was a factual determination:

> In this instance, Mr. Thorns' rebuttal testimony was sufficient to create *a question of fact* for the jury as to value. Secondly, even without this rebuttal testimony, the jury could have reasonably arrived at a value lower than New Orleans 2000's lowest estimate by comparing the methods of valuation and the comparables used by NOEHA's experts in its case in chief with those used by New Orleans 2000's experts, even though each set of experts used a different date of valuation.
>
> . . . . we had to examine the record to determine whether, based on the evidence presented, the jury's *factual determination of $13,000,000.00* as the appropriate compensation was

> reasonable. After having so examined the record, we do not find the jury's verdict to be unreasonable or manifestly erroneous. *There was a tremendous amount of competent but conflicting evidence presented to the jury.* Viewing the evidence as a whole, the jury could have reasonably found that the property was worth more than New Orleans 2000 paid for it in September of 1991, but less than the estimates of New Orleans 2000's experts.[2]

In effect, N.O. 2000 attempts to create a federal constitutional issue out of a jury's factual determination of competent but conflicting evidence. The truth is, a jury heard over 11 days of testimony from *both* parties as to the fair market value of the expropriated property as of the date of trial.[3] At the conclusion of this evidence, the trial court properly instructed the jury, in accordance with this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984), that it should value the expropriated property as of the date of trial.[4] The jury then

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2. *See, e.g.,* pp. 22-23 of the Fourth Circuit's opinion, which can be found on pp. 21a-22a of Appendix A of N.O. 2000's Petition. [Emphasis supplied.]

3. It should be noted that N.O. 2000's two appraisers presented evidence that the fair market value of the property was $28.4 million and $32.36 million, respectively, while NOEHA's three appraisers presented evidence that the fair market value of the property was $5.534 million, $5.525 million, and $5.25 million, respectively. The day *after* NOEHA filed its expropriation suit, N.O. 2000 purchased the *entire* 72 acres, of which NOEHA expropriated *only* 22.85 acres, for $11 million.

4. *See, e.g.,* pp. 124-26 of volume 39 of the trial transcript, a copy of which is attached hereto as Appendix A, wherein the trial court instructed the jury that: (1) "[c]ompensation begins with the full fair market value of the property taken *as of today* . . . ; (2) "[y]our duty is to determine what, based on the evidence, is the fair market value of the property taken *now, as of the end of this trial* (Cont'd)

deliberated, and decided that the value of the property as of the date of trial was $13 million. The trial court subsequently rendered a judgment consistent with the jury's verdict, and after thoroughly reviewing the voluminous record of these proceedings, the Fourth Circuit Court of Appeal for the State of Louisiana affirmed the judgment as reasonable. As this Court aptly stated in *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

What N.O. 2000 really wants is for this Court to substitute its judgment regarding the value of the expropriated property for that of a jury which heard 11 days of conflicting trial testimony. Its reference to *Kirby Forest Products, Inc. v. United States* and the Fifth and Fourteenth Amendments is simply a transparent attempt to mislead this Court into believing that a federal constitutional issue exists in this litigation. It does not.

(Cont'd)
today . . .;" (3) "[a] person may be able to purchase land at below fair market value and/or purchase land that later rises in value. If so, a landowner is entitled to the benefit of his bargain, that is, the difference between the low price of landowner paid for the land and the amount the land is actually worth when put to its highest and best use *as of today, which is the end of trial;*" (4) "[i]n deciding the compensation to New Orleans 2000 for the land expropriated, you must determine what, based on the evidence, is the fair market value of the property taken *now, as of the end of the trial . . .*" [Emphasis supplied]. Curiously, N.O. 2000 argued in its Original Brief to the Fourth Circuit Court of Appeal that "[t]he district court correctly held and instructed the jury that the date of valuing the property at issue was the date of trial." *See, e.g.*, p. 33 of N.O. 2000's Original Brief, a copy of which is attached hereto as Appendix B.

B. The "Question Presented" In N.O. 2000's Petition Was Not Raised At The Appellate Court Level, And Thus, It Is Not Properly Before This Court.

Irrespective of whether there is a federal constitutional issue involved in this case, this is the first forum in which N.O. 2000 has raised the issue of "[w]hether the valuation of an expropriated parcel which is less than one-half of the parcel's fair market value at the time of trial is inconsistent with this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984), interpreting the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment."[5] In fact, N.O. 2000 raised 27 issues in its lengthy appellate brief to the Fourth Circuit of Appeal, and the above-stated issue was not included therein. A copy of that portion of N.O. 2000's appellate brief containing its "Issues Presented For Review" is attached hereto as Appendix B.

The law is clear that this Court cannot consider an issue which was not raised at the appellate court level. *See, e.g., Radio State WOW v. Johnson,* 326 U.S. 120, 128 (1945) and *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958). In the instant case, N.O. 2000 did not raise the above-mentioned issue in its brief to the Fourth Circuit Court of Appeal. Therefore, it cannot properly raise that issue with this Court.

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5. *See, e.g.,* the "Question Presented" at p. i of N.O. 2000's Petition.

CONCLUSION

N.O. 2000's Petition for a Writ of Certiorari should be denied. Despite N.O. 2000's reference to this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984) and the Fifth and Fourteenth Amendments, there is no federal constitutional issue in this case. The trial court properly instructed the jury, in accordance with *Kirby* and the Fifth and Fourteenth Amendments, that they should determine the property's value as of the day of trial. That is exactly what the jury did after hearing 11 days of competent and conflicting evidence of the market value of the property at issue.

Furthermore, the issue presented by N.O. 2000 in its Petition was not raised in its brief to the Fourth Circuit Court of Appeal. Thus, that issue is not properly before this Court.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF TRIAL COURT PROCEEDINGS DATED DECEMBER 10, 1992

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 91-16839
C/W 92-4155
DIVISION "J"

BOARD OF COMMISSIONERS, ET AL

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

Testimony and notes of evidence, taken in the above-mentioned cause, before the HONORABLE GEORGE C. CONNOLLY, JR., on the 10th day of December, 1992.

APPEARANCES:

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Representing New Orleans 2000

Appendix A

REPORTED BY:

BARBARA A. BURGER
CERTIFIED SHORTHAND REPORTER

* * *

[Commencing at page 124]

* * *

. . . instructed you today.

Compensation begins with the full fair market value of the property taken as of today, at its highest and best use in the foreseeable or not too distant future.

In determining how much compensation is due to the landowner-developer, you are instructed that the landowner-developer's right to use property for business pursuits in hope of generating a profit is clearly one of the rights which flows from property ownership.

Your duty is to determine what, based on the evidence, is the fair market value of the property taken now, as of the end of this trial today, at its highest and best use in the not too distant future.

A person may be able to purchase land at below fair market value and/or purchase land that later rises in value. If so, a landowner whose land is expropriated is entitled to the benefit of his bargain, that is, the difference between the low price the landowner paid [125] for the land and the amount the land is

actually worth when put to its highest and best use valued as of today, which is the end of the trial. The gain or loss on the land belongs to the landowner and not the expropriating agency.

The determination of what amount would compensate the owner of a property right to the full extent of his loss must be made on the evaluation of the facts of each case and the uniqueness of the thing taken.

In deciding the compensation to New Orleans 2000 for the land expropriated, you must determine the fair market value as of today of the 22.85 acres being taken.

Fair market value is the value which a willing purchaser would pay and a willing seller would accept today, after exposure on the market for a reasonable length of time, neither being under a compulsion to sell or to buy, considering the best and highest use for which the property is suited in the reasonably foreseeable future.

[126] In determining fair market value of the property taken at its highest and best use as of today, you must look forward to the reasonably probable highest and best use of the land in the future. It is not relevant and your evaluation should not be affected by whether the owner would receive more or less than he paid for the property. Your duty is to determine what, based on the evidence, is the fair market value of the property taken now, as of the end of the trial, at its highest and best use in the reasonably foreseeable distant future.

Some factors to be considered in determining highest and best use are: proximity to areas already developed in a manner compatible with the intended use; action already taken to develop

land for that use; scarcity of land available for that use; use permitted by zoning ordinances; use to which the property is being put at the time of taking; existence of offers to buy property by those wanting to develop residential property or by those wanting

. . . .

APPENDIX B — EXCERPTS OF PETITIONER'S ORIGINAL BRIEF IN THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

* * *

7. THE TRIAL COURT CORRECTLY HELD THE VALUATION DATE TO BE THE DATE OF TRIAL.

A. The *Kirby* Decision Controls the Issue As A Matter of the U.S. Constitution

The district court correctly held and instructed the jury that the date of valuation of the property at issue was the date of trial. The simplest reason why the district court's decision in this regard should be affirmed is because the United States Supreme Court says it should. In *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 104 S.Ct. 2187 (1984), the high court held that the 5th Amendment of the U.S. Constitution requires that the date of valuation in a "regular" expropriation suit, such as the one at hand, cannot be earlier than the date of trial: The court noted that in a regular condemnation the "taking" occurs only upon payment. 104 S.Ct. at 2194. While the court may adopt the date of trial as the date of valuation for convenience purposes, "if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the [expropriator] tenders payment, it violates the Fifth Amendment." *Id.* at 2198, Syl. pts. 41-43.

* * *

Appendix B

* * *

IV. *ISSUES PRESENTED FOR REVIEW*

1. Where the United States Supreme Court has ruled the date of valuation in a "regular" expropriation case may not be any earlier than the date of trial, does the district judge err in charging the jury to value the property as of the date of trial?

2. Where there can be no taking unless and until the expropriating agency first obtains a lawful judgment and *pays* full compensation thereunder to the property owner, does it now follow that the date of valuation would be set as of date of trial, or date of payment is same if delayed?

3. Is not expropriation in derogation of customary property rights and therefore to be strictly construed against the expropriator and liberally construed in favor of the landowner?

4. Can a property owner in Louisiana, consistent with the Constitution, be deprived of Art. I, § 4 rights to "acquire, own, control, use, enjoy, protect and dispose of private property" by a public need "announcement" or threat of expropriation, but without the due process of law and compensation being paid in advance of the dispossession?

5. If the expropriating agency may not expropriate unless and until it fully and strictly complies with the statutory prerequisites, which include payment of a judgment first obtained, how can that agency claim to "freeze", limit or take one's rights to buy, use or sell one's property by merely announcing that it wants or has a need for one's property?

6. Can the constitutional right of a citizen to own, use and alienate property, and to be free from confiscation without due process and being paid "the full extent of his loss," be consistent with NOEHA's theory that it has no obligation to pay fair market value if the owner will "make a profit?" If not, does not the Constitution prevail?

7. Is not the contract lawfully executed on June 11, 1991 by which N.O. 2000 obtained the legal right to buy the 72 acre tract from MOPAC for $11 million a "property right" of N.O. 2000 under the Louisiana and United States Constitutions?

8. Does not the constitutional right to receive full fair market value for property taken by the government include the right to the benefit of any bargain lawfully contracted for, particularly where the contract was signed three months prior to the expropriation?

9. On June 11, 1991, did not MOPAC have the right to bind itself to sell, and N.O. 2000 bind itself to buy, the 72 acre tract, and if so, upon subsequent expropriation of part, is not N.O. 2000, as the transferee of those property rights, entitled to receive the full fair market value thereof, including market value arising from the intervening legalization of riverboat gaming?

10. If MOPAC had kept the property, rather than agreeing in June of 1991 to sell it to N.O. 2000, would not NOEHA herein have been obligated to pay the same $13 million fair market value? That being the case, why should NOEHA pay less to MOPAC's transferee?

11. If there exists no case in which the property owner was paid less than the fair market value of the *land* taken, even when the land was purchased after the expropriation suit was filed, was the district court wrong in rejecting NOEHA's suggestion that it need

only pay to N.O. 2000 up to the amount paid by N.O. 2000 for the land, regardless of a higher actual fair market value as of the date of valuation?

12. Should not the district court have granted (1) judgment n.o.v. for at least $28,4000,000 to N.O. 2000 upon the failure of NOEHA to have its appraisers conduct *bona fide* appraisals of the property at or near the date of trial valuation date; or alternatively (2) a new trial on both the "taking" and/or the "valuation" issues?

13. Where the trial court correctly ruled in advance of trial that the valuation date was the date of trial and not the date of suit and N.O. 2000's appraisers valued the property as of the expected trial date at $28.4 to $32.4 million; and where NOEHA's counsel chose to have its experts appraise the property as of September 11, 1991, must not the appellate court, if not the trial court, enter judgment for at least $28.4 million, the lesser of the proper valuation date amounts as to which testimony was adduced?

14. Does not L.R.S. 19:2.2 require an expropriating agency to fully comply with all of its stated requirements before filing an expropriation suit?

15. Would not the failure of an expropriator to comply with any of the prerequisites to filing suit set forth in L.R.S. 19:2.2 make any suit filed by the expropriator void and ineffective?

16. May an agency like NOEHA that is statutorily obligated to abide by the laws and "other ordinances of The City of New Orleans" take 10.85 acres of private property for the purpose of truck marshalling where, under the City Charter, no public body is allowed to make use of property inconsistent with any part of New Orleans's Master Plans, where that acreage is no longer "needed" by NOEHA for truck marshalling and where use of that acreage for

truck marshalling is inconsistent with New Orleans long range development plans.

17. Where the expropriator's own consultants suggest a need of no greater than 900,000 square feet of exhibition space, and users prefer a downriver location, was it error and unreasonable for the trial court to award to NOEHA 12 acres of upriver riverfront land to expand to 1.1 million square feet?

18. Where riverfront development would be best served by a shorter building providing the requisite square footage expansion, is not the agency unreasonable and arbitrary in takin more land than is absolutely necessary?

19. Where the trial judge rules in advance of the valuation trial that the knowledge of potential expropriation by N.O. 2000 is irrelevant, should NOEHA's counsel have abided by the ruling? Was the failure to do so unfairly prejudicial?

20. Where a state agency seeks to expropriate 10.85 acres for commercial truck marshalling or car parking purposes, does not it violate the prescription of La. Const. Art. I, § 4 against of commercial business enterprises?

21. Where counsel for NOEHA ignored the trial court's ruling and argued to the jury that N.O. 2000 should not be allowed to profit from "our" public funds, was the trial judge not correct in charging the jury to award fair market value even if same resulted in a "profit?"

22. Where the trial judge's public necessity judgment of July 8, 1992 predicates any taking on the payment of the final judgment of fair market value, attorney's fees and costs, does not the Court

err in signing, at NOEHA's request, an order of appeal, thus inadvertently divesting itself of jurisdiction to complete the compensation process?

23. Is not the district judge obliged to award attorney's fees to a property owner to whom NOEHA sought to pay only $4.36 million through trial, and who offered the owner's predecessor in title only $5.5 million (actually offering N.O. 2000 nothing prior to filing suit), where the jury awarded $13 million, or almost 250-300% of these respective amounts?

24. Was not the compensation "to the full extent of his loss" referred to in La. Const. Art. I, § 4 meant to include payment of attorney's fees in a situation like this one?

25. Should the appellate court award attorney's fees or should it remand to the district judge to render the award based upon his more complete knowledge of factors relevant to valuing the services rendered?

26. Where a party has received the expert reports of and deposed the defendant's valuation experts, and knowingly calls his own experts in his case in chief to testify as to valuation as of an incorrect valuation date, is it not beyond the scope of proper rebuttal to attempt to place the same witness on the stand to again testify as to his valuation results or methods? Should not the trial judge exclude such testimony?

27. Where the trial court provides charges requested by NOEHA, or follows authorities cited by NOEHA and fairly apprises the jury of the applicable law, does he commit manifest error?

* * *